

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 24, 2018**

Diane M. Fremgen  
Acting Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP2040-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2011CF502**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GEORGE GUTIERREZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County:  
EUGENE A. GASIORKIEWICZ, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. George Gutierrez appeals from a judgment convicting him of fourteen felony counts relating to the sexual abuse of his

daughters. He contends that the circuit court erroneously exercised its discretion in denying his motion to admit extrinsic evidence against one of the victims. He further contends that the exclusion of such evidence violated his constitutional right to present a defense. We reject Gutierrez’s arguments and affirm the judgment.

¶2 Gutierrez was accused of sexually assaulting his two daughters, T.M.G. and J.M.F., multiple times between 2003 and 2011. For each victim, the State charged Gutierrez with one count of repeated sexual assault of a child, three counts of incest, and three counts of child enticement.

¶3 Before trial, Gutierrez filed a motion to admit extrinsic evidence that T.M.G. had made a prior unsubstantiated allegation of physical abuse against a teacher she did not like.<sup>1</sup> The theory of the motion was that when T.M.G. is confronted with a certain circumstance (conflict with an adult), she reacts by telling a certain sort of lie (a false claim of abuse). Gutierrez alleged that this was relevant to his defense because T.M.G. was angry at him for being a strict disciplinarian, and this explains why she made the false allegation of sexual abuse.

¶4 Following a hearing on the matter, the circuit court denied Gutierrez’s motion. Among other things, the court noted that: (1) although T.M.G.’s prior allegation of physical abuse was unsubstantiated, it was not found to be false; (2) a jury would have to conduct a “mini-trial” to determine the prior allegation’s veracity, and it might not be able to reach a decision; (3) the low probative value of the proffered evidence was outweighed by its high prejudicial

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<sup>1</sup> The extrinsic evidence would have been introduced via the testimony of Gutierrez, T.M.G.’s mother, and/or an investigating law enforcement officer.

effect; and (4) T.M.G.'s character for truthfulness was not an essential element of Gutierrez's defense.

¶5 The matter proceeded to trial where a jury found Gutierrez guilty on all charges. The circuit court subsequently imposed an aggregate sentence of thirty years of initial confinement and thirty years of extended supervision. This appeal follows.

¶6 On appeal, Gutierrez contends that the circuit court erroneously exercised its discretion in denying his motion to admit extrinsic evidence against T.M.G. He further contends that the exclusion of such evidence violated his constitutional right to present a defense.

¶7 This court reviews a circuit court's decision to admit or exclude evidence under the deferential erroneous exercise of discretion standard. *See State v. Vollbrecht*, 2012 WI App 90, ¶25, 344 Wis. 2d 69, 820 N.W.2d 443. We will affirm the decision if there is a reasonable basis for it in the record. *Id.* Whether the exclusion of evidence violates a defendant's constitutional right to present a defense is a question of constitutional fact that we review de novo. *State v. Dodson*, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998).

¶8 We begin our analysis by examining the admissibility of Gutierrez's proffered evidence. At times, Gutierrez argues that the evidence was admissible as other acts evidence. At other times, he appears to suggest that the evidence was admissible as a specific instance of conduct to prove T.M.G.'s untruthful character. Accordingly, we address both theories.

¶9 The admissibility of other acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose

under WIS. STAT. § 904.04(2) (2015-16);<sup>2</sup> (2) whether it is relevant; and (3) whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Such evidence generally cannot be used to prove the character of a person. *See* § 904.04(2)(a).

¶10 WISCONSIN STAT. § 904.04(1)(b),<sup>3</sup> meanwhile, allows the accused to present evidence of a pertinent character trait of the crime victim. Such evidence

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2015-16 version. WISCONSIN STAT. § 904.04(2) provides:

(2) OTHER CRIMES, WRONGS, OR ACTS. (a) *General admissibility*. Except as provided in par. (b)2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

<sup>3</sup> WISCONSIN STAT. § 904.04(1) provides in relevant part:

(1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

....

(b) *Character of victim*. Except as provided in [WIS. STAT. §] 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

may include specific instances of conduct, provided that the character trait is an essential element of a defense. WIS. STAT. § 904.05(2).<sup>4</sup>

¶11 Upon review of the record, we are satisfied that there was a reasonable basis to deny the proffered evidence's admission as other acts evidence. Even assuming that the evidence was offered for a permissible purpose, it was of questionable relevance due to the fact that it involved an unsubstantiated allegation of physical abuse as opposed to a false allegation of sexual abuse. In any event, the evidence's probative value was substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. As the circuit court observed, a jury would have had to conduct a "mini-trial" to determine the prior allegation's veracity, and it might not have been able to reach a decision. The court's concerns that such a tangential trial would cause prejudice and unnecessarily distract the jury were legitimate and support its ruling.

¶12 Likewise, we are satisfied that there was a reasonable basis to deny the proffered evidence's admission as a specific instance of conduct to prove T.M.G.'s untruthful character. As a threshold matter, a single instance of conduct cannot establish a character trait. See *State v. Eugenio*, 219 Wis. 2d 391, 404, 579 N.W.2d 642 (1998) ("[A]llegations of a single instance of falsehood cannot imply a character for untruthfulness just as demonstration of a single instance of truthfulness cannot imply the character trait of veracity."). Even if it could,

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<sup>4</sup> WISCONSIN STAT. § 904.05(2) concerns methods of proving character and provides:

(2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

Gutierrez could only introduce such evidence if T.M.G.’s character for truthfulness was an essential element of his defense. The circuit court concluded that it was not, and its ruling is supported by *State v. Evans*, 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994).

¶13 In *Evans*, a defendant charged with sexual assault of a child sought to introduce extrinsic evidence that, in the past, his accuser had made false allegations regarding matters unrelated to the charged crime. *Id.* at 75-76. The circuit court rejected that attempt, and this court affirmed its ruling. *Id.* at 74. In doing so, we recognized that, while the accuser’s character for truthfulness might be relevant to the defendant’s defense, it was not an essential element of his defense. *Id.* at 82. We reasoned that, “[i]t is akin to ... using evidence of honesty to disprove a theft. Use of [the accuser’s] alleged character for untruthfulness to disprove her allegation of sexual assault is merely a circumstantial inference and in no way reaches the level of an essential element of [the defendant’s] defense.” *Id.* The same logic applies to Gutierrez’s case and bars his attempt to admit the proffered evidence as a specific instance of conduct to prove T.M.G.’s character.

¶14 We turn next to Gutierrez’s constitutional right to present a defense. Defendants enjoy a constitutional right to present evidence under the confrontation and compulsory process clauses of the Sixth Amendment to the federal constitution and article I, section 7 of the state constitution. *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). However, that right is not absolute. *Id.* at 646. The confrontation and compulsory process clauses “only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.” *Id.*

¶15 Here, the circuit court excluded Gutierrez’s proffered evidence, in part, because its low probative value was outweighed by its high prejudicial effect. We agree with that analysis and, for that reason alone, could reject Gutierrez’s constitutional claim. However, we also note that Gutierrez was still able to present his essential defense at trial. On cross-examination of J.M.F., Gutierrez’s attorney established not only that T.M.G. had a reputation within her family for untruthfulness, but also that she would make up allegations when she was angry with someone.<sup>5</sup> Gutierrez subsequently testified about a conflict he had with T.M.G. around the time that she came forward with her allegation of sexual abuse. For these reasons, we conclude that Gutierrez’s constitutional right to present a defense was not violated.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>5</sup> The following exchange took place between Gutierrez’s attorney and J.M.F. on cross-examination:

Q. Now, the reason your mother was concerned about [whether to believe T.M.G.’s allegation of sexual abuse] was because at that time in the family, your sister had a reputation, is that right? Did she have a particular reputation with regard to truthfulness?

A. Yes.

Q. Okay. And the reputation was this, if she got really mad at somebody, she would make up allegations to try to get them into trouble. Was that her reputation in the family?

A. Yes.

